

Appeal from decision of the Yuma District Office, Bureau of Land Management, setting new rental for agricultural lease AZA 22507.

Affirmed in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Leases

Where an agricultural lease provides an option to renew the lease for another 5-year term but no request for renewal is filed before the expiration of the lease, the renewal option expires with the lease and it is not improper to issue a new lease with a shorter term.

2. Appraisals--Federal Land Policy and Management Act of 1976: Leases

When granting an interest in public land such as an agricultural lease to a private citizen, the Department is required under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), to obtain fair market value. However, the value of authorized improvements owned by anyone other than the United States is not included in the determination of fair market value.

3. Appraisals--Federal Land Policy and Management Act of 1976: Leases

The exclusion of improvements from appraised value is based on their removability and the lack of Government ownership. Although pumps and other well equipment may be removable, the availability of water is not usually an improvement that can be removed, and BLM may properly consider that factor as distinguished from the physical equipment of the well in appraising the land.

4. Appraisals--Federal Land Policy and Management Act of 1976: Leases

Where the record in an appeal from a rental appraisal not only refutes the appellants' argument that the rental is too high but shows that BLM's rental rates

are based on inadequately justified downward adjustments from comparable transactions, the decision is properly set aside and the case remanded to BLM either to establish higher rates in alignment with comparable transactions or to provide justification for any downward adjustment.

5. Federal Land Policy and Management Act of 1976: Leases

A new lease provision that requires the lessee to pay to BLM rental amounts collected from a sublessee in excess of the rental rate in BLM's lease will be affirmed as properly implementing the statutory requirement that BLM obtain fair market value for the land it leases.

APPEARANCES: Willis A. Brown, pro se; Robert Moeller, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Willis A. Brown has appealed from the July 8, 1992, decision of the Yuma, Arizona, District Office, Bureau of Land Management (BLM), approving agricultural lease AZA 22507 with a 3-year term and an annual rental of \$15,600 based on a rate of \$120 per acre. Appellant's prior lease had a 5-year term and an annual rental of \$75 per acre. He also had subleased the land for an annual rental of \$175 per acre. ^{1/} Appellant objects to the 3-year term, the \$120 per-acre rental rate, and the provision of the new lease requiring that the profits from subleasing be turned over to BLM.

We affirm BLM's issuance of a lease with a 3-year term because appellant filed no written request for a 5-year renewal prior to December 31, 1991, when the lease and the option to renew expired. See David L. Paluska, 136 IBLA 234 (1996). We also affirm the lease provision requiring that the profits from subleasing be turned over to BLM, but set aside the \$120 rental rate, not because it is too high, but because it is too low. See Kelly E. Hughes, 135 IBLA 130 (1996).

Appellant states that he spent all his working life developing this raw land and his own capital for all improvements, particularly a deep well established in 1952. However, the history of this parcel is the same as

^{1/} Appellant's sublease of parcel 22507 to Jim Cuming is reported as comparable lease No. 5 in the Yuma Rental Rate Summary in BLM's appraisal report which is captioned as follows: Appraisal of Public Lands as Applied to Agriculture Uses Administered by the Yuma District, Bureau of Land Management, and Recommendations for Fair Market Rental Fees Covering Agriculture Leases in the Colorado River Portion of Arizona & California with Individual Sites in the Areas of Needles, Palo Verde, California and Yuma, Arizona, as of Aug. 14, 1991, Prepared by Dave Beine.

that of other parcels now leased for agriculture along the Colorado River in Arizona that the Board described in the appeal of Kelly E. Hughes, supra at 131-32:

These * * * parcels of land are situated at the southwesternmost corner of Arizona along the Colorado River and the border with Mexico. For many years, trespassers farmed public land along the Colorado River. These included Earl Hughes, who watered his parcel by pumping water from the Colorado River until he placed a well on parcel 22508 in 1956. In 1961, the Department brought trespass actions against the farmers; these actions were settled by agreements establishing payment schedules for trespass damages and providing for permits for the former trespassers to continue farming the land.

An inventory of trespasses dated November 17, 1959, confirms that appellant began occupancy in 1938 and that he had established a well on the occupied parcel. A press release dated April 20, 1961, described the Department's plans to resolve the trespass problem, which included issuance of permits to the trespassers. Permit No. 1A-6 was issued to appellant and was renewed over the following years.

Appellant asserts that his lease should have a 5-year term rather than a 3-year term. He states that farmers who came to the BLM office in December 1991 were offered 5-year leases, but those who did not appear received 3-year leases. Appellant states that he called several times that December to schedule an appointment, but his calls never were returned. He states he was told in January that the leases were not ready to be issued and asserts that he never was given a reason for not renewing his 5-year lease.

In a letter dated February 13, 1992, BLM explained that the lease term was reduced to 3 years to conform to BLM's "planning schedule." When appellant objected to the reduction of the term, BLM explained in a letter dated May 5, 1992, that it would consider issuing a 5-year lease to accommodate an assignment of his lease to Kelly Hughes. We note that a letter to appellant dated June 4, 1992, indicated that the legality of pumping water would be reviewed every 3 years, a period coinciding with the term of the lease.

In response to appellant's assertion that BLM had given other lessees a 5-year term, BLM has submitted the affidavit of Michael A. Taylor, which states in pertinent part as follows:

Twenty four leases were due to expire on December 31, 1991. Mr. Brown's lease was among those twenty four. Of all these leases only one lessee was granted a five-year renewal. Unlike Mr. Brown's case, this 5-year renewal was granted because the lessee validly exercised an option to renew his initial five-year lease by requesting a renewal and paying rent prior to the expiration of the lease. The granting of the lease was not therefore based on any arbitrariness or favoritism.

(Answer, Exh. D). BLM further states that the leases were issued on a negotiated basis pursuant to 43 CFR 2920.5-4, and that the 5-year lease was issued on the basis of the lessee's "immediate willingness to agree to the rent and terms as offered at the time offered" (Answer at 5).

[1] BLM contends that the right to renew for a 5-year term expired on December 31, 1991, and the administrative record shows no communication from appellant to exercise the renewal option prior to the expiration of the lease (Answer at 2). In David L. Paluska, supra, we affirmed a BLM decision not to renew agricultural lease AZA 22515 because the lessee filed no written request for renewal prior the expiration of the lease on December 31, 1991. In the instant appeal, BLM has not refused to issue a new lease but has merely granted a lease with a shorter term. Paluska's lease contained the same termination provisions as appellant's lease, set forth as special condition 16.D, which provides: "This lease shall terminate and all rights of the holder hereunder shall cease upon * * * [e]xpiration of the term as set forth in condition B. above, or any renewal thereof." We held that this

language makes it clear that all rights of the holder of the permit, which includes the right to renew the permit, terminated upon the expiration of the original lease term or its renewal term. * * * [T]he option to renew for another 5-year term could only be exercised during the term, itself, since the right to renew would "cease" upon expiration of the lease term. A fair reading of the provisions of the permit simply does not support appellants' assertion that the option to renew could be exercised after the running of the permit term. [Emphasis in original.]

Id. at 238. We also referred to 43 CFR 2920.7(i), which provides that "[t]he holder of a land use authorization * * * shall, upon the filing of a request for renewal, be the preferred user for a new land use authorization provided that the public lands are not needed for another use. Renewal, if granted, shall be subject to new terms and conditions." Brown filed no request for renewal before the lease expired, and we find no error in setting a 3-year term for the new lease.

We turn now to appellant's objection to the increased rental. Appellant characterizes the \$120 per-acre rental as "exorbitant" noting that only his lease and one other lease were increased to that amount. Appellant notes that those leases were the only ones with deep-water wells and that other farmers had their leases increased to \$90 per acre. Appellant points out that the State of Arizona charges \$75 per acre with water delivered. He further states that the appraisal values the land "according to the improvements I have made over 52 years of farming" and that he is "being punished for good land management."

[2] In Hughes, supra at 133, we held that when granting an interest in public land such as an agricultural lease to a private citizen, the Department is required under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), to obtain fair market rental value. 43 CFR 2920.0-6(a), 2929.8;

Russell A. Beaver, 121 IBLA 386, 393 (1991); Sierra Production Service, 118 IBLA 259, 262 (1991); Phyllis E. Lewis, 113 IBLA 376 (1990). However, the value of authorized improvements owned by anyone other than the United States upon the lands involved shall not be included in the determination of fair market value. See 43 CFR 2710.0-6(f).

[3] The lessee of the other parcel containing a well also appealed BLM's decision establishing an annual rental rate of \$120 per acre. Kelly E. Hughes, *supra*. In addition to parcel 22508 which contained a well, his appeal also involved parcel 22512 without a well, for which a rental rate of \$90 per acre was established. Hughes likewise argued that BLM's appraisal was based on his improvements, but we rejected those arguments. We found that BLM had placed no value on the well's physical equipment when conducting the appraisal, having excluded the improvements from appraised value because of their removability. 2/ We noted, however, that although the pumps may be removed, the availability of water is not an improvement that a lessee can remove, and that BLM properly considers that factor when appraising the land. In this appeal as in Hughes, BLM's decision explains how the value of the availability of water is not merely an issue involving a physical improvement to the land:

The Arizona Department of Water Resources has indicated that there is not a permanent source of water available for the subject parcel. However, the Department's position on the pumping of ground water below Morelos Dam has not changed and pumping can continue. The ground water pumping will be reviewed every 3 years to determine if the water use can be continued. The requirement for a legally obtained source of water * * * is satisfied for this 3-year lease period.

The distinction between the value of a well as an improvement and the value of availability of water is more easily understood by realizing that if BLM did not recognize that water could be lawfully drawn from the well, appellant's pumping equipment would impart no value to the land. Appellant would have to obtain water elsewhere, and the value of his parcel would be correspondingly diminished. The fact that appellant has equipped the well is no reason for setting aside BLM's appraisal.

When BLM makes an appraisal for the purpose of determining the rental rate for a parcel, an appraisal based on comparable transactions is deemed more reliable if there is adequate data. Kelly E. Hughes, *supra*; C Bar C

2/ We noted that the well was originally developed by trespassers, and that unlike other improvements subsequently added when the land was under lease, the well belonged to the United States from its inception. In KernCo Drilling Co., 71 IBLA 53, 56 (1983), we stated: "A trespasser * * * is not in privity with the landowner, and if the trespasser installs equipment on the land, he forfeits title to it at the moment of its installation * * *. See 1 G. Thompson, Real Property § 64 (1964)."

Ranch Partnership, 132 IBLA 261, 265 (1995); Communications Enterprises, Inc., 120 IBLA 146, 149 (1991). The appraisal report on which BLM based its decision in this appeal is the same report used in the Hughes appeal and recommends rental rates for 25 agricultural leases. ^{3/} The 25 parcels lie in the Colorado River portion of Arizona and California with individual sites in the areas of Yuma, Arizona; Needles, California; and Palo Verde, California. Appellant's parcel was appraised on the basis of the Yuma Rental Rate Summary, which analyzes 21 comparable leases in North Gila Valley, Yuma, and Somerton/Gadsden, Arizona. BLM's appraisal report indicates that the annual unadjusted per-acre rental rates for agriculture uses in the Yuma area can range from \$75 to \$515, with the lower rates reflecting scarce water and poor growing capacity and with higher rates reflecting one-crop speculative growing conditions (Appraisal Report at 11). The report observes that "BLM is not able to use the same speculative practices [e.g., continuous growing] when leasing the public land" and therefore "sizeable adjustments" of the rents for such one-crop areas are necessary for determining the fair market value of the public lands:

After considerable adjustment, the higher rates do manage to reflect a suggested rental range of \$150 to \$200/Ac for land with a good source of water, and above average growing potential. Without an assured water source, larger downward adjustments suggested a range of \$75 to \$150/Ac/Yr for the BLM administered lands.

It is the appraisers' opinion that most of the BLM administered agriculture parcels are marginal growing lands, with minimal assured water sources, and therefore they require sizeable downward adjustments when compared to the more productive private leases found in the Yuma/Bard/Gila valley areas. [Emphasis in original.]

(Appraisal Report at 11).

We noted earlier that comparable lease No. 5 in the Yuma Rental Rate Summary is actually Brown's sublease of parcel 22507 to Jim Cuming for \$175 per acre annually. We do not understand how appellant can reasonably contend that \$120 per acre is higher than the fair market value of the lease when he charges his sublessee \$175. In responding to Hughes' assertion that the \$90 per-acre annual rental was excessive for the parcel without the well, we noted that Hughes himself had previously subleased that parcel from the prior lessee for \$182 per acre per year. We have previously found the rental paid by a sublessee to be a compelling indication of fair market value. Kelly E. Hughes, supra; Russell A. Beaver, supra. Although Hughes contended that BLM's appraisal was too high, we found that BLM did not adequately justify its downward adjustments because the reasons for such downward adjustments already were comprehended in the rentals paid by the sublessee.

^{3/} See note 1, supra.

[4] In this case, this Department operates under a statutory mandate to collect from the lessees no less than the fair market value for the leases in question, as stated above. Where the record in an appeal from a rental appraisal not only refutes the appellant's argument that the rental is too high but shows that BLM's rental rates are based on inadequately justified downward adjustments from comparable transactions, the decision is properly set aside and the case remanded to BLM either to establish higher rates in alignment with comparable transactions or to provide justification for any downward adjustment. Kelly E. Hughes, supra. Just as we found that BLM did not adequately justify a rental rate as low as \$120 per acre for parcel 22508, we find that BLM in this case has not adequately justified a rental rate as low as \$120 per acre for parcel 22507.

[5] Appellant also objects to the new lease provision that requires the lessee to pay BLM rental amounts collected from a sublessee in excess of the rental rate in BLM's leases. In a letter to appellant dated September 25, 1992, BLM explained:

We are not prohibiting subleasing entirely. The restriction on subleasing is intended to eliminate the brokering of public lands and the substantial profit that is being made by our lessees through subleasing. The agricultural leases provide the lessee with the right to use the land for agricultural purposes, and we do not consider the holding of an agricultural lease for brokering purposes an "agricultural use" of the land. Nor are we receiving fair market value for the use of the land, as required by law, if the lessees are able to sublease the land for considerably more than they are paying in rental fees.

In Hughes and Beaver, we found that the rental paid by sublessees provided the most compelling indication of fair market value. Accordingly, we affirm the above provision as properly implementing the statutory requirement that BLM obtain fair market value for the land it leases.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part for further action consistent with this opinion.

T. Britt Price
Administrative Judge

I concur:

John H. Kelly
Administrative Judge